Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.
Petitioner
vs
LOWE'S COMPANIES, INC.
Respondent

On Petition For Writ of Certiorari
To the United States Court of Appeal for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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2688

QUESTIONS PRESENTED

1. Whether it is unconstitutional for a retail merchant engaged in multi-state public commerce to use racial profiling as a criterion for theft prevention?

2. Whether racial profiling by a retail merchant engaged in multi-state public commerce constitutes ex ante racial discrimination and is this form of discrimination?

3. Whether a retail merchant engaged in multi-state public commerce enjoys absolute immunity from civil action under Title II of the Civil Rights Act of 1964?

4. Does the racial profiling of African Americans by a retail merchant constitute "badges and incidents of slavery" proposed by the United States Supreme Court decision in *Jones v. Mayer?* Does the racial profiling constitute intentional discrimination?

5. Whether a District Court Judge may use his broad discretion to dismiss a case before the facts of the case are determined when those facts determine federal jurisdiction?

TABLE OF CONTENTS

ITEM	PAGE(S)
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS	1
BASIS FOR JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	7
CONCLUSION	12

INDEX TO APPENDICES

DECISION OF COURT OF APPEALS.....A

ORDER OF THE DISTRICT COURT.....B

COURT OF APPEALS DENIAL OF REHEARING.....C

TABLE OF AUTHORITIES

CASES **PAGE(S)**

ANDERSON v. BESSEMER CITY, 470 U.S. 564 (1985).....10
ANDERSON v Liberty Lobby, 477 U.S. 242 (1986).....11
Bushi v. Kirven, 775 .2d 1240, 1257 (4th Cir. 1985).....12
DAVIS v. FRAPOLLY, 747 f. Supp.451,453(N.D. Ill. (1989)).....9
DORSEY v. SOLOMON, D.C.Md. 435 F.Supp. 725 733.....10
ERKINE v. UPHAM, 56 Cal.App. 2D 235, 132 P.2d 219, 228.....10
GERTZ v. BASS, 59 Ill. App.2d 180, 208 N.E. 2d 113 (1965).....10
GRIFFIN v. BRECKENRIDGE, 403 U.S. 88 (1971).....11
JOHNSON v. RAILWAY EXPRESS AGENCY,421 U.S. 454 (1975).....11,12
JONES v. ALFRED H. MAYER, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).....11
MONELL v. DEPT. SOCIAL SERVICE, 426 U.S. 658 (1978).....11
MULLANEY v. WILBUR, 421 U.S. 684, 95 S.Ct.1881, 44 L.Ed.2d. 508 (1975).....9
ODUM v. COLUMBIA UNIVERSITY, 906 F.Supp 188, 194 (S.D.N.Y. (1995)).....9
ORIS v. HIGGINS, 180 F.2d 537 (2ND Cir. 1950) cert. denied 340 U.S. 810 (1950).....11
PATTERNSON v. NEW YORK, 432 U.S. 197 S.Ct. 2319, 53 L.Ed.2d 281 (1977).....9
PEOPLE v. JACOBS 27 Cal.App. 3d 246,103 Cal.Rptr. 536, 543.....10
PEOPLE v. ZELINISKI, 155 Cal.Rtpr. 575, 594 P.2d 1000 (1979).....8
PRIDDY v. SHOPKO CORPORATION, 918 F. Supp. 358,359 (D.Ut. 1995).....7

RICHARDSON v. MILLER, 446 F.2d 1247 (3RD Cir. 1971).....8
STATE v. GILCRIST, 15 Wash. App. 892 552 P.2d 690 693.....10
SULLIVAN v. LITTLE HUNTING PARK, 396 U.S. 229 (1969).....11
TAYLOR v. KENTUCKY, 436 U.S. 478 S.Ct. 1930, 56 L.Ed.2d (1978)..11
UNITED STATES v. FRANCOEUR, 567 F.2D 891 (5TH Cir. 1977.....8
UNITED STATES v. UNITED STATES GYSUM, 333 U.S. 364 (1948)..10
VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEV. CORP., 429 U.S. 252 (1977).....11
WASHINGTON v. DAVIS, 426 U.S. 229 (1976).....11
WESTBURY v. GILMAN PAPER Co., 507 F.2d 206 (5TH Cir. 1975) (42 U.S.C.A. 1985(3)).....12
WILKINS v. MARYLAND, (Civ.No.MJG-93-468 USDC MD).....11

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UNITED STATES CONSTITUTION FOURTH AMENDMENT
UNITED STATES CONSTITUTION SEVENTH AMENDMENT
UNITED STATES CONSTITUTION THIRTEENTH AMENDMENT
UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT
CIVIL RIGHTS ACT OF 1866
CIVIL RIGHTS ACT OF 1871
CIVIL RIGHTS ACT OF 1964
42 U S C 1981
42 U S C 1982
42 U S C 1983
42 U S C 1985

FEDERAL RULES OF CIVIL PROCEDURE # 38, 52, 59

OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of North Carolina as case no. 98-1878. The case is unpublished and the Opinion is attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc which is unpublished as case no. 98-1878. The Court opinion is hereto attached as Appendix C.

The judgment on decision by the United States District Court for the Eastern District of North Carolina unpublished as case no. Ca-97-1040-5-BO. The Order is hereto attached as Appendix B.

JURISDICTION

The petitioner seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of North Carolina. The date that the United States Court of Appeals decided my case was August 26, 1998.

A timely petition for rehearing and suggestion for rehearing en banc was denied on October 19,1998, and an order denying rehearing which appears as Appendix C.

The jurisdiction of this case is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On December 30, 1995, the Petitioner who is a middle aged African American Physician, went to the Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard in Raleigh, North Carolina. The purpose of this shopping excursion was to purchase a replacement water filter cartridge for a water filtration unit that had been purchased at the Lowe's Home Improvement Warehouse previously. The Petitioner was accompanied on this trip by his sixteen year old son who decided to remain in the car since the Petitioner was suppose to pick up one item and quickly return home. The specific item in question was a Teledyne cartridge with Lowe's item number 25694 with a purchase price of $5.96. The Petitioner left his son in the car, telling the son that he would be back in less than five minutes. The Petitioner went into the retail establishment with the clear intent of purchasing merchandise which Lowe's offered for sale. At the time the Petitioner entered the Lowe's Home Improvement Warehouse, he had adequate financial resources on his person for the intended item of purchase. At the time the petitioner entered the retail establishment, he had the following assets on his person: $2,500.00 cash (U.S. Currency), credit cards with purchasing power of $30,000.00, and a credit card issued by Lowe's with a credit line of $4,000.00. Hence, the Petitioner entered the establishment with purchasing power of $36,500.00 to purchase a $5.96 item.

After entering the retail establishment, the Petitioner asked a Lowe's Sales Associate where he might find the item in question. The Lowe's Sales Associate directed the Petitioner to the aisle where desired item was located. After locating the desired item, the Petitioner placed the

item in his hand and proceeded towards the checkout area. However on the way to the front of the store, the Petitioner noticed that Lowe's was having a clearance on computers and related items. Noting what appeared to be a number of good buys, the Petitioner began picking up items for purchase and soon had more items than he could carry in his hands. At this point, the Petitioner realized that he needed a shopping cart or some way to carry the numerous items that he had planned to purchase. The Petitioner saw an unattended shopping cart in the middle of the store with trash paper and cardboard in the bottom. The Petitioner asked a Lowe's Sales Associate for permission to use the abandoned cart and was given permission and assistance in loading the items into the cart. After loading the items into the shopping cart, the Petitioner continued to browse and shop in the clearance area. Many of the items did not have posted prices, the Petitioner again solicited the assistance of a Lowe's Sales Associates. After doing several price checks, the Lowe's Sales Associate helped the Petitioner load several of the bulkier items into the cart. Having second thoughts, the Petitioner decided not to purchase the larger more expensive items but did keep a dozen or so smaller items. The Petitioner proceeded to the checkout counter with the merchandise he had planned to purchase. The Petitioner placed each item on the counter. The items were checked and bagged by the clerk. After receiving payment, the clerk put the transparent bags into the same cart that the Petitioner had used to transport the items to the checkout counter. The Petitioner was given a receipt and proceeded to push the shopping cart through the store exit uneventfully. After leaving the store and while pushing the shopping cart across the parking lot in route to his car, the Petitioner was chased and stopped by a Lowe's Theft Prevention Officer. This Lowe's Theft Prevention Officer aggressively and brazenly approached the Petitioner and accused the Petitioner of **SHOPLIFTING**. Outside of the store in the parking lot, Lowe's Theft Prevention Officer began searching the shopping cart and parcels in a ravenous fashion. The Lowe's Theft

Prevention Officer performed a strip search of parcels and the shopping cart, throwing trash out of the cart and going through each bag demanding to see receipts. This indignity caught the Petitioner completely off guard, in that the Petitioner had not stolen nor conspired to steal any item or items from the Lowe's Home Improvement Warehouse. The Petitioner has no criminal background and is not a thief! This entire abominable episode took place in an open parking lot in view of dozens of witnesses. Because of this disgusting event's rapidity and inhumanity, it took the Petitioner several minutes to get his bearing in this situation. After compliance with all of the Lowe's Theft Prevention Officer's requests and determining that the Petitioner did not steal anything, there was **not** an apology given for this outrageous, humiliating, and defaming conduct by the Lowe's employee. While in the parking lot after this episode, the petitioner, who is normally a pacifist, became angry and verbally rebuffed the Lowe's Theft Prevention Officer. The speech used by the Petitioner was neither blasphemous or would it be considered obscene by the standards of the United States Supreme Court.

The Petitioner followed the Lowe's Theft Prevention Officer back into the store to make an inquiry. The Lowe's Theft Prevention Officer had not given the Petitioner his name. The Petitioner approached the customer service counter in a gentlemanly manner but in severe emotional distress. The Petitioner was given the name of the Theft Prevention Officer involved and the address of Lowe's corporate offices to which he could address his indignation at being publicly humiliated, defamed, and dehumanized. Store personnel supplied all the information requested, including the name of the company president. The entire exchange inside of the store was uneventful. There was no threat of a lawsuit and the Petitioner did not receive an apology from the manager.

As the Petitioner left the store, the event was made more obvious by a comment made by a young African American male Lowe's employee. He had witnessed this atrocity and wished to remain anony-

mous for fear of loss of employment. His comments were: "man they dissed (disrespected) you; they gave you nigger treatment, but I need this job." In addition, other White witnesses commented on the outrageous and obviously racially motivated actions of the Lowe's Theft Prevention Officer. The White witnesses were confounded as to why the Petitioner was stopped and searched when they were not. In that the White witnesses walked out of the store with merchandise in their bare hands without any visible receipts compared to the Petitioner who had his merchandise in bags in a shopping Cart. This incident was so "extreme and outrageous" that it stirred the **"conscious"** and **"morality"**of the White witnesses. The mere fact that conservative White males would convey to the Petitioner their observation of this maltreatment, is illustrative of the "outrageousness" of the Lowe's Theft Prevention Officer's actions. Upon returning to the Petitioner'car, his son inquired as to why it took so long? An explanation was given to the Petitioner's son who became upset. The Petitioner returned home with elevated blood pressure, chest and epigastric pain.

After two years of requesting an apology from Lowe's and finally receiving a response from Lowe's corporate office which stated that the treatment which the Petitioner received was appropriate, a civil action was filed in United States District Court on December 30, 1997. The case was dismissed without Pretrial Discovery on May 14,1998. The decision of the District Court was affirmed in the Court of Appeals August 26, 1998, and a request for rehearing was denied on October 19, 1998.

REASONS FOR GRANTING THE WRIT

The Petitioner, Larry Barnes, Sr., petitions the Supreme Court of the United States pursuant to 28 U.S.C. 1254(1) to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The Petitioner has no other adequate means to obtain the relief he seeks absent an adjudication of the constitutional validity of racial profiling by retail merchants.

Under the Civil Rights Act of 1964, the Justice Department can obtain injunctions ordering restaurant, hotels, theaters, and other places of public accommodations not to discriminate; not included are retail establishments. In recent court rulings, the courts state that: "... The clear indication is that Congress did not intend to include retail establishments." *Priddy v. Shopko Corporation*, 918 F. Supp 358, 359 (D. Ut. 1995).

Private retail establishments have abused what appears to be omission on the part of Congress to carry out clearly unconstitutional and intentional acts of racial discrimination through racial profiling its African Americans customers. Lowe's, Inc surreptitiously uses this technique in its theft prevention program.

This issue is in urgent need of review by the Court. Retail Merchants where not specifically included in Title II of the Civil Rights Act of 1964. As a result, they have enjoyed immunity from prosecution under these laws. As in the instant case where a large national corporation, Lowe's, Inc, victimized the Petitioner by subjecting him to its system of racial profiling as a tool for theft prevention.

The issue of racial profiling is widespread both in the public and private sector. Cases involving governmental sponsored racial profil-

ing and discrimination can be dealt with expediently by the Courts because of provisions in the Fourth, Thirteenth, and Fourteenth Amendment to the Constitution. The Maryland Court of Appeals ruled that state police could not use racial profiles as a cause to search vehicles of African Americans. *Wilkins v. Maryland State Police* (Civ. No. MJG-93-468 USDC MD). Since the above Constitutional provisions cannot be readily applied in private civil actions, current federal laws have not served as a deterrent for acts of retail racial discrimination and criminal profiling of African Americans. Consistent with the private search doctrine, it has been generally held that private security personnel are not subject to fourth Amendment constraints as long as they do not go beyond protecting the interest of their employer. *United States v. Francoeur*, 547 F.2d 891 (5th Cir. 1977); *People v. Zeliniski*, 155 Cal. Rptr.575, 594 P.2d 1000(1979).

Racial profiling is not a specific policy; it is a concept. It is a widespread discriminatory practice of stereotyping and projecting criminal inferences onto African Americans. Racial profiling of African American projects a dehumanizing image of increased criminal mischief and an indicia of suspiciousness about the Black race. This invasive practice vilifies African Americans, as in the case of this Petitioner in which the retailer (Lowe's, Inc) in which he was chosen unfairly as a likely suspect. It would be assumed the retail organizations might decide on the basis of "good corporate citizenship" or "good faith" not to profile African Americans or at least apply controls to ensure that the procedure would be fair and non-discriminatory. They have not done this because as in the instant case, Lowe's, Inc is aware that existing laws and statutes do not prohibit this practice by retailers. Hence, there is no peer review of a retailer's practice of racial profiling since it is conducted outside of public, legislative, and statutory monitoring. As it stands at the present time, private retailers are free to practice, develop, and practice any racial profiling method as they desire without any

mechanism to preserve the individual rights and civil liberties of their victims who are usually African Americans.

Racial profiling of African American constitute ex ante discrimination and guilt prediction. Retailers tend to be proactive identifying African Americans as potential offenders before they commit an offence. These actions are contrary to American Jurisprudence since they cause an inversion of the onus of proof; the onus of proof has traditionally been on the accuser. Racial profiling places the onus of proof on the accused as with the Petitioner in the instant case. This reversal of the onus of proof in alleged criminal actions which results from racial profiling is unconstitutional and is denial of due process. When a person is charged with a criminal act there must be a "Presumption of innocence". *Taylor v. Kentucky* ,436 U.S. 478 S.Ct. 1930, 56 L.Ed.2d (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Patternson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977);

The practice of racial profiling to prevent shoplifting by Lowe's, Inc and other private retail merchants represents a racially motivated conduct intended to discriminate against African Americans. In the instant case Lowe's, Inc has no practice of profiling White customers proactive to identify potential offenders. In dealing with White customer at Lowe's, there is no surreptitious judgmental valuations. In this case, there are specific facts which show an intent on the part of Lowe's Inc. to discriminate based upon race. In this instance, the evidence at hand including the selective action taken against the Petitioner and its verification by both Black and White witnesses makes the case valid. The Petitioners claims under Sections 1981 and 1982 are valid. *Odum v. Columbia University*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995); Davis v. Frapolly, 747 F. Supp. 451, 453 (N.D. Ill. 1989).

Racial profiling of the Petitioner by Lowe's Inc. directly resulted in violations of the Petitioner's civil rights under the Thirteenth and Fourteenth Amendments to the United States Constitution, Civil Rights

Act of 1866, Civil Rights Act of 1871, and U.S.C.secs. 1981,1982,1983,
1985. This instant case was improperly and prematurely dismissed by the District Court before facts of the case were determined without pretrial discovery. The Court of Appeals affirmation of the unjustly dismissal by the Court denied due process and equal protection to the Petitioner for his federal torts. The premature dismissal by the District Court and affirmation by the Court of Appeals denied the Petitioner fundamental fairness and substantial justice. *People v. Jacobs,* 27 Cal.App.3d 246, 103 Cal.Rptr. 536, 543; 14th Amendment. *Dorsey v. Solomon,* D.C.Md. 435 F.Supp. 725, 733.

The affirmation of the District Court's dismissal of the case by the Court of appeals severely limited the rights of the Petitioner (an individual) and extended infinite rights to Lowe's, Inc. (corporation/merchant). In the Court of Appeals failure to overturn the District Court's dismissal of the case without determining the facts therein based on the Federal Rules of Evidence, a prejudicial error was created and affirmed. This prejudicial error substantially affected the Petitioner's legal rights and obligations, and presumptively his right to a jury trial. This prejudicial error should have been grounds for reversal of judgment or a new trial under Rule 59 Federal Rules of Civil Procedure. *Gertz v. Bass*, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965); *Erskine v. Upham*, 56 Cal.App. 2d 235, 132 P.2d 219, 228; *State v. Gilcrist*, 15 Wash.App. 892 552 P.2d 690, 693; *United States v. United States Gysum Co.*, 333 U.S. 364 (1948). The Court of Appeals affirmation in this case unfairly denied the Petitioner the right to a trial by jury under Seventh Amendment to the United States Constitution pursuant Rule 38 and 52 Federal Rules of Civil Procedure.

The Petitioner could have at pre-trial hearings and at trial met and maintained the evidentiary burden of proof. Based on the evidence in this case, any reasonable jury would return a verdict in favor of the Petitioner. The Court of Appeals affirmation of the District Court im-

proper dismissal resulted in denial of justice to the Petitioner. *Anderson v. Bessemer city*, 470 U.S. 564 (1985); *Orvis v. Higgins*, 180 F.2d 537 (2nd Cir. 1950), cert denied, 340 U.S. 810 (1950); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

In *Jones v. Alfred Meyer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L.Ed. 2d 1189 (1968), the Court indicated that the Thirteenth Amendment was intended to prohibit not just slavery but the " badges and incidents of slavery". The Court ruled that the Amendment's Prohibitions are not only against government but also against private entities and persons who intentionally commit discriminatory acts. In *Jones*, the controversy arose when defendants refused to sell land to Blacks. The plaintiffs Jones and his wife sued; claiming they had not been allowed to buy property because he Black. There were no state or federal aid or actions which might have subjected the defendants to federal statutes prohibiting such discrimination. The principle issue in this case was one of private racial discrimination. To decide this case, the Court revivified a provision of the 1866 Civil Rights Act, Section 1982. The Court concluded based upon judicial and legislative history that the drafters intended the act to apply to private as well as public acts of discrimination. The Court ruled legislation rationally connected with the eradicating of slavery and its " badges or incidents" is valid under the Thirteenth Amendment, and that private discrimination may constitute such a " badge or incident". While the Petitioner's case would not be covered under Public Accommodations, it would be covered under *Jones*. A federal claim exists because of the act of intentional discrimination. The Court has repeatedly affirmed this ruling. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). Section 1983 while primarily directed at actions by state and local governments, it also prohibits intentional private discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Monell v. Department of Social Services*, 426 U.S. 658

(1978);*Richarson v. Miller*, 446 F.2d 1247 (3rd cir. 1971); Griffin v. Breckenridge, 403 U.S. 88 (1971). Some lower courts have rules that under certain conditions the Fourteenth Amendment is applicable to acts of private discrimination. *Westbury v. Gilman Paper Co.*, 507 F.2d 206 (5th cir. 1975) (42 U.S.C.A. 1985(3)).

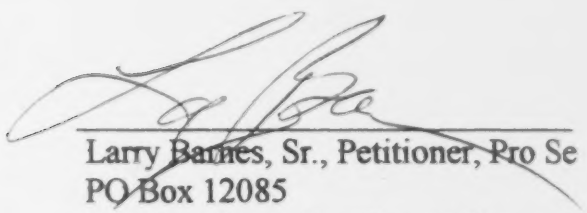
Lowe's, Inc. committed racial profiling and a conspiracy to falsify the course of events in violation the Petitioner's rights under Section 1985. The conspiracies in this case are widespread, including denial of the entire incident as verified by the proceedings in this case. To prove a conspiracy under Section 1985, there must be 1) two or more parties involved, 2) race based-invidious discrimination, 3) a deprivation of equal enjoyment of rights, 4) resultant injury and, 5) an overt act. The records of the filings in this case shows that the Petition's case meets all five of these criteria. *Bushi v. Kirven*, 775 .2d 1240, 1257 (4th Cir. 1985); Griffin v. Breckinridge 403 U S 88 102-03 (1971).

The practice of racial profiling by retail merchants is a very important issue of federal law concerning the constitutional rights of those who are victims. As illustrated in this case, it is the basis for the violation of individual civil liberties and constitutional rights. However, this Honorable Court has never decided the constitutionality of racial profiling and discrimination by private retail merchants. The extraordinary remedy provided by a writ of certiorari pursuant to 28 U.S.C. 1254(1) is the only means available for the Petitioner to have a fair and impartial litigation of his constitutional claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1878

LARRY BARNES, SR., M.D., J.D.,

Plaintiff - Appellant,

versus

LOWE'S COMPANIES, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-97-1040-5-BO)

Submitted: July 30, 1998 Decided: August 26, 1998

Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Larry Barnes, Sr., Appellant Pro Se. Robert W. Sumner, Kari Russwurm Johnson, CRANFILL, SUMNER & HARTZOG, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's order granting Defendant's motion to dismiss. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Barnes v. Lowe's Companies, Inc., No. CA-97-1040-5-BO (E.D.N.C. May 14, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

APPENDIX A

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILED
MAY 14 1998
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

No. 5:97-CV-1040-BO(2)

LARRY BARNES, SR., M.D.,

Plaintiff,

v.

LOWE'S COMPANIES, INC.,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant's Motion to Strike portions of Plaintiff's complain, and Plaintiff's Motion for Leave to Amend his complaint. The underlying action asserts causes of action under the Thirteenth and Fourteenth Amendments to the United States Constitution; Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, as amended; section 1981, 1982, 1983, and 1985 of Title 42 of the United States Code; and several state law causes of action. Upon consideration of the parties' arguments, and for the reasons discussed herein, Defendant's motion will be granted and Plaintiff's complaint dismissed in its entirety.

BACKGROUND

On December 30, 1995, Plaintiff Larry Barnes, Sr., M.D. (hereinafter, "Dr. Barnes"), entered the Lowe's Home Improvement Warehouse, a retail establishment of the Defendant, Lowe's Companies, Inc. ("Lowe's"), in Raleigh, North Carolina. After Plaintiff paid for his purchases and obtained a receipt, he was confronted by a Lowe's "Theft Prevention Officer,"

APPENDIX B

Gene Blount ("Blount") as he left the store. Blount asked Plaintiff to produce a receipt for the items in his shopping cart. Plaintiff alleges that Blount searched his shopping cart in a hostile manner. Apparently finding nothing in Plaintiff's possession that did not belong to him, Blount returned to the store. Dr. Barnes followed Blount inside, approached the service desk, and asked for Blount's name, as well as the address of Lowe's company headquarters. Plaintiff wrote several letters to Lowe's corporate officials but received no apologies or compensation for his alleged grievances.

Plaintiff brought this action on December 30, 1997, alleging that he was detained and searched because he is African-American, and Lowe's acts of "mercantile racism" violated his federal constitutional rights and gave rise to state tort causes of action for false imprisonment, defamation, corporate malpractice and negligence. Plaintiff seeks compensatory damages of one million dollars and punitive damages of twenty-five million dollars. Defendant filed the instant motion to dismiss, as well as a motion to strike parts of Plaintiff's complaint,[1] on March 4, 1998. Plaintiff filed a motion for leave to file an amended complaint on March 24, 1998, and a response to Defendant's motion to dismiss on March 27, 1998. All of the pending motions are now ripe for adjudication.

DISCUSSION

A. Plaintiff's Motion for Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure gives the Court discretion to allow a party leave to amend its complaint after a responsive pleading has been filed. This discretion

[1] Having considered the allegedly improper allegations in Plaintiff's complaint, the Court hereby DENIES Defendant's Motion to Strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

APPENDIX B

includes the right to deny leave to amend when the proposed amendments would be futile. Finding that the amendments proposed by Plaintiff do not set forth new valid causes of action, and merely restate claims made in Plaintiff's original complaint, the Court hereby DENIES Plaintiff's Motion for Leave to Amend his complaint.

B. Defendant's Motion to Dismiss

Motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure should only be granted in limited circumstances. De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir 1989). Inferences should be construed in the light most favorable to the party opposing the motion, and the motion should be granted only if that party has no chance of prevailing on the merits of its argument.

1. **Plaintiff's Federal Claims.** Plaintiff fails to state a claim under Title II because Lowe's is not a "place of public accommodation" as defined by that statute. Plaintiff fails to allege facts that would indicate that the Lowe's facility in Raleigh is anything other than a retail establishment. Congress defined places of public accommodation as including "restaurant[s], cafeteria[s], lunchroom[s] . . . or other facilit[ies] principally engaged in selling food for consumption on the premises." 42 U.S.C. § 2000a(b)(2). Also included are hotels, inns, motels, etc., 42 U.S.C. § 2000a(b)(1), and motion picture houses, theaters, stadiums, and the like, 42 U.S.C. § 2000a(b)(3). Congress did not include retail stores under the definition of places of "public accommodation," and Dr. Barnes cannot ground a lawsuit on Title II based on the conduct alleged to have occurred at the Lowe's Raleigh facility.

Similarly, Plaintiff fails to properly ground his complaint under section 1983 and 1985 of Title 42. Section 1983 requires a showing of state action, which Plaintiff does not allege in this

APPENDIX B

case. And, while section 1985 does not require a showing of state action, a claim under subsection three (3) of this section (which is the only arguably applicable subsection) requires two or more persons to conspire to deprive any person or class of persons of the equal protection of the laws. Thus, like all other claims under the Fourteenth Amendment, claims brought pursuant to section 1985 require state action. Plaintiff thus may not rely on section 1983 or 1985 as a basis for his claims.

Nor does Plaintiff properly allege a cause of action under sections 1981 or 1982. Section 1981 provides that all persons "shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Section 1982 provides that all citizens shall have the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property." Plaintiff simply does not allege the type of conduct by Defendant that would implicate the rights protected by these statutes. Plaintiff's federal claims must therefore be dismissed for failure to state a claim.

2. Plaintiff's State Law Claims. Having dismissed the federal basis of Dr. Barnes' complaint, the Court must now decide whether to exercise its discretion and retain jurisdiction over the supplemental, state-law claims. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the United States Supreme Court emphasized that the federal courts power to hear pendent claims "is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726, 86 S. Ct. at 1139. The doctrine of Gibbs and its progeny was codified in Section 1367 of Title 28 of the United States Code, under the name "supplemental jurisdiction," as part of the Judicial Improvements Act of 1990, Pub.L. No. 101-650, Title III, § 310. The Fourth Circuit, interpreting Section

APPENDIX B

1367, has noted that "[t]he doctrine of supplemental jurisdiction indicates that federal courts generally have discretion to retain or dismiss state law claims when the federal basis for an action drops away." Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995).

The Fourth Circuit emphasized "that trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." Id. at 110. Thus, this Court will consider factors such as convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and judicial economy. Id.

While the case has not advanced past the motion to dismiss stage, the parties have expended much time and energy in prosecuting and defending this action. Also, the status of the law required to resolve this state law issue is well-settled in North Carolina, and does not require this Court to anticipate a decision of the North Carolina courts. Thus, the principle of comity can be respected while retaining jurisdiction of this claim. The Court will thus consider Plaintiff's state law claims.

Plaintiff's causes of action for false imprisonment and slander are barred by the applicable statute of limitations. Section 1-54(3) of the North Carolina General Statutes states that causes of action for "libel, slander . . . or false imprisonment" must be brought within one year of the date of the alleged incident. The facts complained of by Dr. Barnes in this matter are alleged to have occurred on December 30, 1995; Plaintiff did not initiate this action until December 30, 1997, two years after the date of the incidents in question.

Plaintiff's fourth and fifth claims for relief accuse Lowe's of failing to follow the appropriate "standard of care" and making an "incorrect diagnosis," and of negligently failing to

APPENDIX B

train its employees "to respect human dignity." These claims are insufficient as a matter of law. While Plaintiff accuses Lowe's employees of making an "incorrect diagnosis" that he was a shoplifter, his factual allegations are simply insufficient to show that the employees behaved improperly in simply asking him for a receipt for his purchases. Merely being asked to produce a receipt for one's purchases does not rise to the level of harm which is an essential element of a negligence claim.

Plaintiff's state law causes of action are therefore all insufficient as a matter of law and must be dismissed.

CONCLUSION

For the reasons stated above, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiff's complaint in its entirety.

SO ORDERED.

This 9th day of May, 1998.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Rebeca Bowen
Deputy Clerk

APPENDIX B

United States District Court

Eastern District of North Carolina

FILED

MAY 14 1998

DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

LARRY BARNES, SR., M.D.

Plaintiff,

v.

Judgment in a Civil Case
Case Number: 5:97-CV-1040-BO(2)

LOWE'S COMPANYIES, INC.

Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant's motion to dismiss is granted and this action is hereby DISMISSED;

JUDGMENT FILED AND ENTERED THIS 14TH DAY OF MAY, 1998, AND COPIES MAILED TO:

Larry Barnes, Sr., M.D.
Plaintiff Pro Se
2920 Legging Lane
Raleigh, NC 27615

Robert W. Sumner, Esq.
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Raleigh, NC 27611-7808

May 14, 1998

DAVID W. DANIEL, CLERK

/s/ Rebeca Bowen
Deputy Clerk

APPENDIX B

FILE COPY

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 19, 1998

No. 98-1878
CA-97-1040-5-BO

LARRY BARNES, SR., M.D., J.D.

Plaintiff - Appellant

v.

LOWE'S COMPANIES, INCORPORATED

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX C